MARINE CONSERVATION ALLIANCE

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September 5, 2003

Ms. Kaja Brix
Chief
Marine Mammal Conservation Division
ATTN: ZMRG
Office of Protected Resources
National Marine Fisheries Service
1315 East West Highway
Silver Spring, MD 20910

Dear Ms. Brix:

The Marine Conservation Alliance (MCA) offers the following comments in response to the Advance Notice of Proposed Rulemaking (ANPR) published by the National Marine Fisheries Service (NMFS) regarding the definition of the zero mortality rate goal (ZMRG) under the Marine Mammal Protection Act (MMPA). 68 Fed. Reg. 40888 (July 9, 2003).

The Marine Conservation Alliance was established in 2001 by fishing associations, communities, Community Development Quota groups, harvesters, processors, and support sector businesses to promote the sustainable use of North Pacific marine resources by present and future generations -- based on sound science, prudent management, and a transparent, open public process. The MCA supports research and public education about the fishery resources of the North Pacific, and seeks practical solutions to resource use questions to protect the marine environment and to minimize adverse impacts on the North Pacific fishing community.

Before proceeding to the specific issues raised in the ANPR, it is important to place the ZMRG concept into perspective. The MMPA requires that commercial fishermen reduce the incidental mortality and serious injury of marine mammals to an insignificant level approaching a zero mortality and serious injury rate. No one advocates unnecessary incidental injuries and mortalities; and Alaska's commercial fishermen seek to prevent that. The problem is not with the goal. The problem is that ZMRG is an unnecessary tool that distorts ecosystem-based biological management by placing marine mammals above all other species. Indeed, a zero mortality policy is the equivalent of treating all marine mammals as if they have been listed under the Endangered Species Act, even if their populations are healthy and growing.

In a terrestrial context, the U.S. Forest Service managed the National Forest System for many years by identifying the primary species it wished to benefit in each National Forest and then managing the forest for the benefit of those species. That system of giving management priority to a limited number of species is similar to giving marine mammals primacy in the ocean. The Forest Service generally abandoned this single species policy because it adversely affected biodiversity by attempting to manage the environment for the benefit of a few species without full consideration of the needs of other species. Similarly, managing the ocean environment for the benefit of one species places other species at a disadvantage and threatens biodiversity.

In California, sea otters eat abalone. But they eat such large quantities of mature abalone that the ecosystem is left with significantly reduced quantities and the remaining abalone are small juveniles. Similarly, elephant seals using coastal beaches are destroying nesting habitat of the threatened snowy plover.

The Canadian Department of Fisheries and Oceans has concluded that growing marine mammal populations in that country are hindering the recovery of depressed cod stocks. Indeed, some experts have commented that marine mammals consume between three and six times the entire worldwide commercial fisheries catch. Trends in Ecology and Evolution, Vol. 16 No 2, Feb. 2001 at 78.

The point is that there are consequences for other species that flow from managing the oceans to give marine mammals the first and highest priority. While no one supports or condones actions leading to marine mammal mortality and injury, ZMRG is an inappropriate management tool because it ignores the needs of other species in the ocean ecosystem. It also ignores the needs and interests of other ocean users. Certainly, the ZMRG objective of maintaining marine mammal populations at or near their maximum population level in the ecosystem is important. So are providing food for people and jobs for workers. With over $3 billion in sales and nearly 37,000 jobs in Alaska in 2001, the commercial seafood industry deserves serious consideration as well.

The problem with ZMRG begins with the statutory formula for determining the Potential Biological Removal (PBR) that can be allowed for a marine mammal species. 16 U.S.C. § 1362(20). To compute PBR, the minimum marine mammal population is multiplied by 50% of the maximum annual net reproduction rate. The resulting number is then reduced by multiplying it by a recovery factor of 0.1 for endangered species, 0.5 for threatened or status uncertain species, and 1.0 for others. While the preceding computations are outside the scope of the ANPR, they are the basis upon which ZMRG is computed. The policy question is why scientists should not use the actual population level and reproduction rate supported by the data rather than the minimum population level and only half of the reproduction rate.

The problems associated with the very conservative PBR formula are then magnified by ZMRG. After determining PBR, NMFS, under current policy, computes ZMRG by reducing the PBR by 90%. 68 Fed. Reg. at 40891, NMFS Option 1. Any fishery taking fewer than this final number is at ZMRG. But this ZMRG formula is designed to return marine mammal populations to levels that would exist in a pristine environment. Indeed, the net result is that marine mammal populations are maintained at 90% or more of the carrying capacity of the ecosystem. For no other ocean species is the management objective to return populations to their pristine level. This objective can only be achieved at the expense of other species, including endangered and threatened species. Equally importantly, this objective is achieved at the expense of providing food for the people of this country and the world because ZMRG will restrict commercial fishing even when there is no reasonable or foreseeable threat to healthy marine mammal populations. The societal cost of this "marine mammals first" policy will also be felt in reduced jobs and income in the fishing industry.

Moreover, a review of the origins of the ZMRG concept clearly demonstrates that any NMFS rule using ZMRG as a regulatory standard designed to return marine mammal populations to their pristine levels is contrary to Congressional intent. When the MMPA was enacted in 1972, ZMRG was applied exclusively to the yellowfin tuna purse seine fishery in the Eastern Tropical Pacific Ocean. Congress determined that the level of marine mammal mortality incidental to this fishery was unacceptable and established ZMRG for that fishery. However, in enacting ZMRG, Congress was clear that it did not intend to significantly curtail or shut down the fishery as long as the Secretary of Commerce "is satisfied that the tuna fishermen are using the best available technology to assure minimal hazards to marine mammal populations." H. Rept. 707, 92nd Cong., 1st Sess. (1971) at 24. The Senate Report stated ZMRG should be met "through the use of currently available technology . . . ." S. Rept. 863, 92nd Cong., 2nd Sess. (1972) at 6. Any doubt about Congressional intent was dispelled by the Conference Committee, which stated that ZMRG might be the objective, but technology limitations could prevent achieving that goal. H. Rept. 1488, 92nd Cong., 2nd Sess. (1972) at 23. ZMRG was a goal that had meaning only within the context of applying existing technology. The intent was to use existing technology to reduce incidental marine mammal mortality. ZMRG was not a bright line that, once crossed, required the imposition of fishery restrictions and closures.

Congress reaffirmed its intent when it considered amendments to the MMPA in 1981. The House Report stated ZMRG "is satisfied . . . by a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable." H. Rept. 228, 97th Cong., 1st Sess. (1991) at 17. When Congress reauthorized the MMPA in 1984, it noted the goal of achieving ZMRG was constrained by what is "economically and technologically practicable." H. Rept. 758, 98th Cong., 2nd Sess. (1984) at 6.

Although Congress sought to encourage the development of new technology to reduce incidental interactions with marine mammals, it was always clear that ZMRG was satisfied by the use of the best available technology that was technologically and economically feasible to

employ. Indeed, the Senate Report on the original 1972 legislation made it abundantly clear that using ZMRG as a bright line standard regardless of the economic consequences for the fishermen was unacceptable. S. Rept. 863, 92nd Cong., 2nd Sess. (1972) at 6-7.

Congress applied ZMRG to all commercial fisheries in 1994, retaining the concept that regulatory plans to achieve ZMRG should be developed "taking into account the economics of the fishery, the availability of existing technology, and existing State or regional fishery management plans." 16 U.S.C. § 1387(f)(2). The Senate version of the bill authorized the Secretary to issue emergency regulations if incidental takings in a commercial fishery were having an immediate and significant adverse impact on a marine mammal stock. However, even then, the Secretary was to "take into account the economics of the affected fishery and the availability of existing technology to minimize takings . . . ." S. Rept. 220, 103rd Cong., 2nd Sess. (1994) at 14. Thus, even in an emergency situation, the Secretary's actions were constrained by whether existing technology was economically and technically feasible.

The first question posited in the ANPR is how to apply technological and economic feasibility considerations in determining ZMRG. 68 Fed. Reg. at 40891. That question can only be answered by providing that ZMRG is satisfied for species which are not listed as endangered, threatened, or depleted if the fishery is employing the best available technology that is economically and technologically feasible, provided that incidental mortality and serious injury in the fishery does not exceed the PBR. This is fully consistent with the MMPA which defines PBR as the number of animals, not including natural mortalities, which can be removed from a marine mammal stock while still allowing that stock to reach or maintain its optimum sustainable population (OSP). 16 U.S.C. § 1362(20). If the MMPA's goal is for marine mammal stocks to achieve OSP, 16 U.S.C. § 1361(2), then that goal is achieved by using PBR. Artificially reducing PBR, let alone reducing PBR by 90%, as is NMFS' current practice, is unnecessary to achieve the MMPA's biological objective. Thus, where PBR is not exceeded, ZMRG should be considered met for species that are not endangered, threatened, or depleted if fishermen are using the best technology that is economically and technologically feasible.

This leads to the second question raised in the ANPR regarding a numerical standard for ZMRG. 68 Fed. Reg. at 40891. As noted above, ZMRG should be defined using PBR and a technology standard for species that are not endangered, threatened, or depleted. Although applying PBR without any further ZMRG reduction will also allow species which are endangered, threatened, or depleted to reach OSP, it may be appropriate to consider a more restrictive numerical standard in order to hasten the achievement of that goal. If NMFS decides to adopt such a numerical goal for protected species, we recommend that NMFS adopt option 2. 68 Fed. Reg. at 40891.

That said, there are two significant policy issues implicit in each of the numerical ZMRG options that must be addressed.

The first policy issue is the definition of OSP. Option 1 suggests OSP should be 90% of carrying capacity for healthy stocks, 95% for status uncertain stocks, and 98% for endangered, threatened, and depleted stocks. Option 2 suggests OSP is 90% of carrying capacity, while Option 3 suggests OSP is 95% of carrying capacity. However, NMFS has already defined OSP as a range of population levels between 60%-100% of carrying capacity. 50 C.F.R. § 216.3. It is inappropriate, unwise, and likely a violation of law to use this ANPR to redefine OSP only for commercial fishermen. Indeed, it could well be argued that the only legally permissible numerical goal is 60% of carrying capacity, since the MMPA only requires the achievement of OSP and that is accomplished at 60% of carrying capacity. If NMFS wishes to change or clarify the definition of OSP by establishing OSP as a fixed point population level higher than that provided for in existing regulations, then NMFS should do so by separate rulemaking. The premise upon which the options are based is flawed. Moreover, by effectively redefining OSP, NMFS is compounding the problems already inherent in ZMRG and is effectively punishing commercial fishermen by requiring that ZMRG not be used to achieve OSP, but that ZMRG be used to achieve almost the highest possible population levels of marine mammals.

The second policy issue is the rate at which OSP must be achieved. The discussion of the options, particularly Option 2, suggests that there is some rate at which OSP must be achieved, but there is no support for that position in law. Thus, the characterization of Option 2 as delaying the "recovery date" of a species by no more than 10% incorrectly assumes the MMPA requires a specific recovery date. This premise, upon which NMFS' analysis is based, is incorrect.

We recognize the statute sets timelines for achieving ZMRG. However, that is not synonymous with a Congressional amendment redefining OSP and setting deadlines for achieving OSP. The legislative history is devoid of any support for such a position. The statutory deadlines and the legislative history are more consistent with the view that the deadlines are for using the best economically and technologically feasible fishing techniques and gear.

Bearing these facts in mind, if a numerical standard reducing PBR is appropriate to hasten the day on which endangered, threatened, and depleted species reach OSP, then Option 2 is most appropriate. Indeed, in considering the issue of a numerical limitation beyond PBR, it is important to recognize that even without the ZMRG overlay, the PBR for protected stocks "is already set at biologically insignificant levels." 68 Fed. Reg. at 40892. Since PBR alone establishes biologically insignificant interaction levels and Option 2 provides an additional layer of protection, it is wholly unnecessary for NMFS to impose the even more stringent recovery factors set forth in Options 1 and 3. Options 1 and 3 are not mandated by statute and are unnecessarily restrictive.

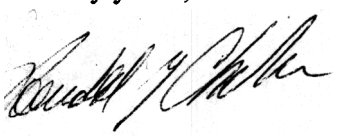
Moreover, Option 2 is fully consistent with other provisions of the MMPA which allow the Secretary to authorize the incidental mortality and serious injury of endangered and

threatened marine mammals pursuant to commercial fishing operations if the incidental mortality and injury will have only a "negligible" impact on the species. 16 U.S.C. § 1371(a)(5)(E) Indeed, this provision of law provides support for the view that Congress intended to have one standard -- a negligible impact standard -- for endangered and threatened species, and a different standard for other marine mammals.

In conclusion, MCA recommends NMFS declare that ZMRG is met when PBR is not exceeded and fishermen are using the best technology that is economically and technologically feasible. If an additional numerical protection is necessary for marine mammal species listed as endangered, threatened, or depleted, then MCA recommends that NMFS implement Option 2.

Thank you for the opportunity to comment.

Sincerely yours,



Ronald G. Clarke
Executive Director